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No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TENNESSEE GAS PIPELINE COMPANY,
Petitioner,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals acted consistently with this Court's standards for judicial review set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1985), in expanding the judicially-created filed rate doctrine to set aside the Federal Energy Regulatory Commission's rate methodology which allocates pipeline costs currently incurred in settling take-or-pay liabilities to those customers whose past purchasing practices most directly caused those costs.

PARTIES TO THE PROCEEDING

A list of parties to the proceeding below are included in Appendix J to this petition. App. 201a-204a. Pursuant to Rule 29.1, the following is a list of petitioner's parent company and non-wholly owned subsidiaries:

Tenneco, Inc. (parent)
Akulu Chemicals Coast (PTY) Limited (South Africa)
Akulu Chemicals (PTY) Ltd. (South Africa)
Akulu Marchon (PTY) Ltd. (South Africa)
Albright, Morarji and Pandit Limited (India)
Albright & Wilson Asia Taiwan Limited (Taiwan)
Albright & Wilson Australia Limited (Australia)
Albright & Wilson New Zealand Limited (New Zealand)
Alcan Ekco Limited (United Kingdom)
A/S Haustrup-Ekco Aluminium-Emballage (Denmark)
Case Poclain S.A. (France)
Case Poclain GmbH & Co. (Germany)
Case Vibromex GmbH Und Co. (Germany)
Consolidated Diesel Company
(North Carolina Partnership)
Ekco S.A.R.L. (France)
Hay & Forage Industries (Kansas Partnership)
HT Gathering Company (Texas)
Intertractor Viehmann GMBH & Co. (Germany)
J.I. Case SpA (Italy)
Kern River Gas Supply Corporation (Delaware)
Kern River Service Corporation (Delaware)
Monroe Auto Pecas S.A. (Brazil)
Oasis Pipeline Company (Delaware)
Omni-Pac GmbH (Germany)
Omni-Pac S.A.R.L. (France)
P.P.M. Guindastes Hidraulicos S.A. (Brazil)
Polyphosphates Inc. (Philippines)
Poclain do Brasil S.A. (Brazil)
S.A. Paper Chemicals (Pty) Limited (South Africa)
Sara Gretes Cafeteria AB (Sweden)
Skogstre A/S (Norway)
Specialty Phosphates (Malaysia) SDN BHD (Malaysia)

Sperry Marine Limited (United Kingdom)
TENN-USS Chemicals Finance Corporation (Delaware)
Tenneco Automotive Foreign Sales Corporation Limited (Jamaica)
Tenneco Canada, Inc.
Tenneco Deutschland Beteiligungs GmbH (Germany)
Tenneco Oil Company of Nigeria Unlimited (Nigeria)
Tenngasco Gas Gathering Company (Delaware-in dissolution)
Toyo Ekco Company, Ltd. (Toyo Ekco Kubushiki, Kaisha) (Japan)
Vibromax France S.A.R.L. (France)
Vibromax SCI (France)
Walker Deutschland GmbH (Germany)

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-28a) is reported at 893 F.2d 349 (D.C. Cir. 1989). The order denying rehearing together with the concurring opinion of Judge Williams and the dissenting opinion of Chief Judge Wald, joined by Judges Mikva and Edwards (App. 29a-34a), is reported at 898 F.2d 809 (D.C. Cir. 1990).

The relevant orders of the Federal Energy Regulatory Commission (App. 94a-170a) are reported at 42 FERC ¶ 61,175 and 43 FERC ¶ 61,329.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1989. App. 1a-28a. Rehearing was denied on March 30, 1990. App. 29a-34a. This Court has jurisdiction under 28 U.S.C. § 1254(1). On April 23, 1990, the court of appeals granted a stay of its mandate pending the filing by June 22, 1990 of petitions for a writ of certiorari. App. 35a-36a.

STATUTES INVOLVED

Section 4 of the Natural Gas Act, 15 U.S.C. § 717c, provides in relevant part as follows:

> (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.
>
> * * * *
>
> (c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.
>
> (d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in

> any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

Section 5 of the Natural Gas Act, 15 U.S.C. § 717d, provides in relevant part as follows:

> (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

STATEMENT

This case raises a fundamental question concerning the Federal Energy Regulatory Commission's ("FERC" or "Commission") ratemaking powers under the Natural Gas Act ("NGA") and its ability to resolve the industry-wide multi-billion dollar take-or-pay crisis that has gripped the natural gas industry for nearly a decade. See *Mobil Oil Exploration and Producing Southeast, Inc.* v. *FERC*, 885 F.2d 209, 223-24 (5th Cir. 1989), *cert. granted sub nom., Mobil Oil Exploration and Producing Southeast, Inc.* v. *United Distribution Cos.*, 58 U.S.L.W. 3768 (U.S. Jun. 4, 1990) (No. 89-1452); 885 F.2d at 234-35 (Brown, J., dissenting). Section 4(a) of the NGA, 15 U.S.C. § 717c(a), requires that rates charged by interstate pipelines be "just and reasonable." In determining just and reasonable rates through which pipelines could recover billions of dollars of costs incurred largely due to FERC's radical restructuring of the natural gas industry, FERC required pipelines to allocate a portion of those costs among customers under a method designed generally to ensure that those customers whose past reductions in purchases caused the pipelines' current take-or-pay costs would be primarily responsible for those costs in their current rates.[1]

Petitioner, Tennessee Gas Pipeline Company ("Tennessee"), is one of the nation's major interstate natural gas pipelines. Pursuant to FERC's policy, Tennessee entered into settlement agreements with producers and has been passing a portion of the settlement costs it is incurring through to its customers under the allocation method established by FERC. Nearly every other interstate natural gas pipeline has done the same. After the

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[1] This is the leading vehicle for review of this ratemaking policy. Approximately 50 other cases, many of them consolidations of numerous appeals, involving FERC's application of this policy to other pipeline systems are being held in abeyance pending the Court's disposition of this petition.

pipelines entered into these settlements and while they were attempting to recover the costs, however, the court of appeals overturned the allocation method in use on the ground that it resulted in a retroactive increase in previously filed rates, in violation of the "filed rate doctrine." App. 10a-16a. Thus, the basic issue posed by the decision below is whether a reviewing court at this critical period for the natural gas industry should accord FERC a significant measure of discretion as the court reviews the myriad orders issued to restructure the market or whether, instead, that court can manipulate a legal doctrine to block FERC's attempt to bring stability and rationality to the sale and transportation of natural gas.

1. *Regulatory Background.* Prior to FERC's restructuring program that has given rise to this controversy, interstate natural gas pipelines operated primarily as "merchants," purchasing gas from producers and transporting and reselling it to customers. Historically, pipelines purchased gas from producers under long-term contracts, usually of 20 years, in order to provide reliable gas service under firm sales contracts with their customers and to comply with their certificates of public convenience and necessity issued by FERC. See, *e.g.*, 18 C.F.R. § 2.61. These long-term purchase contracts commonly included "take-or-pay" provisions. Those provisions, particularly the ones in contracts entered into during the gas shortage of the 1970s and early 1980s, required pipelines to pay natural gas producers for a high percentage of their deliverable gas—even if the pipelines actually took less. See *Associated Gas Distributors* v. *FERC*, 824 F.2d 981, 996 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) ("*AGD I*"). Simultaneously, FERC allowed many pipelines to maintain longstanding tariff provisions known as "minimum bills," which required the pipelines' customers to take a minimum quantity of gas or to pay for that gas even if not taken.

In 1984, FERC issued Order No. 380 and embarked on a radical program to increase competition in the natural

gas industry. Order No. 380 largely eliminated the pipelines' minimum bill protection, freeing pipeline customers —but not pipelines—from liability for gas not taken. FERC chose not to decide at that time what to do about the pipelines' ongoing take-or-pay obligations to producers, indicating that it would address that issue later. The D.C. Circuit affirmed, stating that FERC was not required to address all problems associated with the restructuring of the industry simultaneously. *Wisconsin Gas Co.* v. *FERC*, 770 F.2d 1144, 1159-60 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986). FERC eliminated the remaining portion of pipeline minimum bill protection in individual orders. In Tennessee's case, the D.C. Circuit expressly recognized that FERC's elimination of this protection would further exacerbate Tennessee's take-or-pay problems but nevertheless affirmed in light of the court's belief that FERC would fairly resolve the take-or-pay problem through the allocation method now at issue in this case. *Tennessee Gas Pipeline Co.* v. *FERC*, 871 F.2d 1099, 1106 (D.C. Cir. 1989).

In 1985, FERC took a second major step in restructuring the industry in Order No. 436, which instituted an "open access" policy to encourage pipelines to become transporters, as well as merchants, of natural gas. Under FERC's open access policy, pipelines were required to transport gas for all shippers even though those shipments displaced the pipelines' own gas sales. At the same time, however, the pipelines remained obligated to provide all of the gas to which their sales customers were entitled under their firm supply contracts.

Although the provisions of Order No. 380 and Order No. 436 served FERC's goal of enabling pipeline customers to purchase gas from sources other than their traditional pipeline suppliers, they sharply reduced pipeline gas sales because customers, not surprisingly, bought less expensive gas available on the spot market at a time of surplus supply and transported the gas on "open access"

pipelines. Because Order No. 436, like Order No. 380, did not provide pipelines with any relief from their take-or-pay or other contractual commitments to producers, the pipelines' lost sales rapidly translated into huge take-or-pay liabilities.

In *AGD I*, which involved appeals from Order No. 436, the D.C. Circuit recognized that the "open access" policy instituted by Order No. 436 severely exacerbated the pipelines' take-or-pay liability problems. Observing that the pipelines had become "fall guys," bearing the burden of billions of dollars in "uneconomic contracts" brought about by shifts in market prices and "Order No. 436's shift in the balance of forces," *AGD I*, 824 F.2d at 1021, the court admonished FERC that its "decision not to take any affirmative action to solve the problems posed by the uneconomic producer-pipeline contracts . . . fails to meet the standards of reasoned decisionmaking." *Id.* at 1044. Accordingly, because "the Commission's apparent insouciance on take-or-pay taints the package," the court vacated and remanded Order No. 436 to FERC in its entirety, even though the court otherwise approved most of the Order. *Id.*[2]

In Order No. 500, issued in 1987, 52 Fed. Reg. 30,334, *record remanded sub nom., American Gas Ass'n* v. *FERC*, 888 F.2d 136 (D.C. Cir. 1989), FERC responded to the *AGD I* mandate and established a policy to encourage pipelines to "buy-out" or "buy-down" their take-or-pay and other contractual obligations to producers.[3] Under this policy, a pipeline that agrees to absorb

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[2] During this time, the D.C. Circuit also invalidated FERC's new test for abandonment of pipeline service, citing FERC's failure, "repeated in Order No. 436," to address the take-or-pay crisis, "a crucial problem in the natural gas industry. . . ." *Consolidated Edison Co.* v. *FERC*, 823 F.2d 630, 641-42 (D.C. Cir. 1987).

[3] "Buy-out" and "buy-down" costs are amounts paid by pipelines to producers in settlements to extinguish or reduce the pipelines' accrued take-or-pay liability and to reform their contracts.

between 25 and 50 percent of its buy-out and buy-down costs may pass through an equal amount to its current customers by means of a fixed direct charge applied to customers' current rates. *Id.* at 144; 18 C.F.R. § 2.104 (a). FERC determined that each particular customer's rate should reflect the extent to which that customer had reduced its purchases and thereby contributed to the pipeline's take-or-pay problems.[4] See 52 Fed. Reg. at 30,341; 55 Fed. Reg. at 6621.

FERC adopted the purchase deficiency allocation method after extensive hearings, lengthy comments and consideration of numerous allocation proposals. See 52 Fed. Reg. at 30,341-42; 54 Fed. Reg. at 52,346. It found that the purchase deficiency allocation method best satisfied its responsibility under the NGA to ensure "just and reasonable" rates. In so doing, FERC reasoned that the purchase deficiency method of allocating take-or-pay costs fully serves the purposes of the cost causation doctrine—a fundamental ratemaking doctrine—which provides that costs generally should be allocated to those who cause their incurrence.[5] See 55 Fed. Reg. at 6621.

2. *Proceedings Below.* In issuing the orders invalidated by the court of appeals, FERC noted initially that "there is no single or perfect answer to the take-

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[4] Each customer's reduction in purchases—known as "purchase deficiencies"—is the difference between the amount of gas the customer purchased during a "base period" preceding the explosive growth in take-or-pay liability and the lesser amount purchased during a later "deficiency period" when customer reductions caused a decrease in pipeline purchases from producers and an increase in the pipelines' take-or-pay liability. Each customer's responsibility for a pipeline's buy-out and buy-down costs is derived by dividing that customer's purchase deficiencies by the total of all customers' purchase deficiencies and multiplying this ratio by the total amount of the pipeline's buy-out and buy-down costs to be recovered.

[5] See *e.g.*, *Tennessee Gas Pipeline Co.*, 871 F.2d at 1106; *Alabama Electric Coop.* v. *FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982).

or-pay problem." App. 103a. In applying the purchase deficiency allocation method to Tennessee, FERC found on the basis of substantial record evidence a causal link between the purchase reductions of Tennessee's customers and Tennessee's incurrence of take-or-pay liability, consistent with the cost causation doctrine. App. 76a-78a. Accordingly, it approved Tennessee's implementation of the purchase deficiency allocation method to pass through a portion of its take-or-pay buy-out and buy-down costs to its customers. In so doing, FERC addressed contentions that the purchase deficiency allocation method constitutes unlawful retroactive ratemaking in violation of the filed rate doctrine and concluded that it does not. App. 113a-15a. As an initial matter, FERC reasoned that the allocation method does not impose a rate change for gas already purchased; the allocated costs are recovered through a direct charge prospectively imposed under filed tariffs.[6] App. 114a. Moreover, FERC noted, the costs allocated are *current* costs incurred in settling current contract liabilities which were not known or measureable at any previous time. *Id.* Accordingly, FERC concluded, the purchase deficiency allocation method is consistent with "the treatment usually accorded costs incurred in resolving any contract dispute. . . ." [7] *Id.*

To date, Tennessee and other interstate gas pipelines have incurred billions of dollars in buy-out and buy-down costs in reliance on the Order No. 500 program and the

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[6] FERC held that this fact distinguished *Columbia Gas Transmission Corp.* v. *FERC*, 831 F.2d 1135 (D.C. Cir. 1987), relied upon by the court of appeals. App. 113a-15a.

[7] Petitioner initially proposed using a combination of a purchase deficiency allocation and each customer's entitlement to gas under contract as of January 1, 1986. FERC tentatively approved this plan even though it deviated from the purchase deficiency method approved in Order No. 500. App. 113a. On rehearing, however, the FERC reversed itself and concluded that the purchase deficiency allocation was just and reasonable because it "links more closely current cost incurrence with cost causation." App. 147a-51a.

purchase deficiency allocation method. FERC recently stated that pipelines had incurred over $8 billion in buy-out and buy-down costs through 1989 and had recovered approximately $3.4 billion of those costs under the purchase deficiency allocation method. 54 Fed. Reg. at 52,356 n.78. In addition, FERC estimated that it has issued approximately 300 orders on over 50 proposals by 22 pipelines to recover their buy-out and buy-down costs and over 60 proposals by downstream pipelines to pass those costs through to their customers. *Id.* at 52,357.

The court of appeals set aside the order allocating petitioner's costs.[8] App. 1a-28a. Applying this Court's decision in *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981) (*"Arkla"*), as interpreted in its own decision in *Columbia Gas Transmission Corp.* v. *FERC*, 831 F.2d 1135 (D.C. Cir. 1987), the court of appeals held that the purchase deficiency allocation method violates the filed rate doctrine because it employs previous customer purchasing decisions to establish a current rate. App. 10a-16a. According to the court, this use of prior purchasing conduct to establish future rates violates the purpose of the filed rate doctrine—to provide customers with "predictability" concerning the price they pay for gas. App. 14a-15a.

In so holding, the court brushed aside FERC's rationale—that the purchase deficiency allocation method comports with the "cost causation" doctrine embodied in the just and reasonable rate requirement—in favor of the court's own view of the filed rate doctrine. App. 11a-12a. The court of appeals also dismissed FERC's interpretation of the filed rate doctrine as only precluding a regulated company from recovering in current rates past losses or costs which it could have recovered in previously filed rates. App. 11a-13a. Thus, the court found it irrelevant that petitioner had no opportunity to recover the

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[8] The jurisdiction of the court of appeals was based on Section 19(b) of the NGA. 15 U.S.C. § 717r.

take-or-pay costs in the past because they were not known or measurable then. In rejecting FERC's just and reasonable rate determination on this ground, the court of appeals made no mention of the standard of review it employed nor of the records compiled in the proceedings below and the Order No. 500 rulemaking.[9]

On denial of petitioner's suggestion of rehearing *en banc*, three judges dissented and criticized the panel for so readily substituting its own judgment for that of FERC and unlawfully interfering with FERC's broad discretion to set just and reasonable rates:

> In a time when the structure of the natural gas industry is undergoing a sea change, the FERC must be granted considerable discretion to ensure that the transition period is handled in a manner that minimizes the disruption in the industry.

App. 33a. (Wald, J., dissenting from denial of rehearing *en banc*). According to the dissenters, "[t]he panel's overly rigid interpretation of the filed rate doctrine . . . leaves the FERC essentially powerless to take care of the take-or-pay crisis." App. 34a, and will have a significant effect . . . on the functioning of the industry and on the FERC's ability to regulate this 'quiet revolution' in the gas industry." *Id.* On April 23, 1990, the panel, over respondents' objections, stayed issuance of its mandate to permit petitioner and others to seek review by this Court.

REASONS FOR GRANTING THE PETITION

The decision below places a new, and wholly unjustified, limitation on the extremely broad ratemaking authority entrusted to FERC by Congress at a time when

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[9] The court of appeals previously had noted with approval FERC's application of the cost causation doctrine in adopting the purchase deficiency allocation method. See *Tennessee Gas Pipeline Co.*, 871 F.2d at 1106-07 ("[O]rder [No. 500] provides for a method of tracking the customer sources of take-or-pay liability more closely than does the minimum bill").

FERC needs the full range of its power to resolve a multi-billion dollar issue of extreme importance to the natural gas industry and to gas consumers. Contrary to this Court's holding in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1985) ("*Chevron*"), the court of appeals imposed its own interpretation of the filed rate doctrine as a device for setting aside rates found to be just and reasonable by FERC, even though nothing in the plain language of the NGA or its legislative history is inconsistent with the purchase deficiency allocation method adopted by FERC or compels the interpretation of the filed rate doctrine adopted by the court of appeals.

In the process, the court of appeals turned this Court's opinion in *Arkla* on its head. In *Arkla*, the Court identified the purpose of the filed rate doctrine as "preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant." [10] 453 U.S. at 578 (citation omitted). The orders below clearly complied with the

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[10] The origins of the filed rate doctrine can be traced to the Interstate Commerce Act ("ICA") and a number of early decisions of this Court interpreting that Act. In enacting the ICA in 1887, Congress sought to eliminate railroad abuses in the form of unreasonably high, non-cost based rates and preferences for selected customers that were embodied in "an elaborate system of secret special rates, rebates, drawbacks, and concessions." Senate Select Comm., 49th Cong., 1st Sess., Report on Interstate Commerce, 180-81 (1886). By requiring public posting and Interstate Commerce Commission review of rates, Congress sought to "secure equality, so far as practicable, in the facilities for transportation afforded and the rates charged by the instrumentalities of commerce." *Id.* at 182. In the ensuing years, this Court interpreted the ICA consistent with these concerns of Congress. See *Pennsylvania R.R. Co.* v. *International Coal Mining Co.*, 230 U.S. 184 (1913). In *Arkla*, this Court recognized that the filed rate doctrine in the ICA was the genesis of the filed rate doctrine in the NGA and that both were intended to serve the same purpose. 453 U.S. at 577-78.

requirements of the filed rate doctrine as set forth by this Court. FERC exercised its jurisdiction to ensure that Tennessee's new rates were just and reasonable and required Tennessee to file these new rates before charging them to its customers. Tennessee then charged the FERC-approved, filed rates.

Contrary to *Arkla*, however, the court below applied the filed rate doctrine in an unprecedented, expansive manner to undercut and override FERC's discretion to establish just and reasonable rates and adopt the purchase deficiency allocation method at issue here. Moreover, the court of appeals recently has applied this overly expansive interpretation of the filed rate doctrine on two separate occasions [11] to overturn FERC orders and upset the FERC's determination of just and reasonable rates, a determination with respect to which this Court traditionally has afforded FERC the utmost discretion.[12]

Thus, the decision below raises an important federal question concerning the proper interpretation of the filed rate doctrine and the deference owed to FERC in a complex ratemaking matter. A prompt ruling from this Court is essential to provide critically needed guidance concerning FERC's ability to ensure that just and reasonable rates are maintained in the course of this radical restructuring of the natural gas industry.

Finally, review of the decision below is also warranted in light of the Court's decision to review the validity of FERC's Order No. 451. *Mobil Oil Exploration and Producing Southeast, Inc.* v. *United Distribution Cos.*, No. 89-1452 (cert. granted June 4, 1990) (*"Mobil"*). Indeed review here is, if anything, more appropriate than in *Mobil*. While *Mobil* invokes FERC's more limited

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[11] See *Columbia Gas Transmission Corp.* v. *FERC*, 831 F.2d 1135 (D.C. Cir. 1987); *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570 (D.C. Cir. 1990).

[12] See, *e.g.*, *Permian Basin Area Rate Cases*, 390 U.S. 747, 767, 776-77 (1968); *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 589 (1945).

ratemaking authority under the Natural Gas Policy Act ("NGPA"), which will be superceded January 1, 1993 by the Natural Gas Wellhead Decontrol Act of 1989 (Pub. L. No. 101-60, 103 Stat. 157) ("Decontrol Act"), this case involves FERC's continuing ratemaking authority under the NGA to establish just and reasonable rates in the public interest. If not reversed, the decision below will severely undermine FERC's ratemaking authority and will disrupt FERC's restructuring efforts not only in this case but also in other cases in other contexts.

Moreover, in enacting the Decontrol Act, Congress expressly relied upon the existence of both Order No. 451 and Order No. 500 (which this case implemented) as easing the transition to decontrol by 1992. S. Rep. No. 101-39, 101st Cong., 1st Sess., 5-6 (1989). Now both of these elements of that process have been judicially set aside. Because both the order in this case and Order No. 451 are significant parts of "the sea change in the natural gas industry," the Court would benefit by reviewing both orders contemporaneously.

1. The court of appeals invalidated the purchase deficiency allocation method adopted by FERC based on its determination that the methodology violated the filed rate doctrine embodied in the rate filing requirements of Section 4 of the NGA. In so doing, the court did not even acknowledge or cite to this Court's decision in *Chevron* and ignored completely the fundamental principle of deference to agency decisionmaking set forth therein.

In *Chevron*, this Court held that "[w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions." First, the reviewing court must consider "whether Congress has directly spoken to the precise question at issue." If so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." If not, the reviewing court "does not simply impose its own construction on the

statute . . . . the question for the court is whether the agency's answer is based on a permissible construction. . . ." 467 U.S. at 842-43.

In this case, Congress has not directly spoken to the question at issue. Accordingly, it was for the agency, FERC, in the first instance to determine whether the purchase deficiency allocation method is permissible under the NGA. FERC found that it is permissible and, moreover, that it is consistent with FERC's responsibilities under the NGA to establish just and reasonable rates and to allocate pipeline costs to those customers causing their incurrence. App. 111a. In addition, FERC specifically found that the purchase deficiency allocation method does not violate the filed rate doctrine embodied in Section 4. App. 113a-15a, 157a-58a.

Instead of looking to whether FERC's decision was "based on a permissible construction" of the NGA, as required by *Chevron*, the court of appeals "impose[d] its own construction" of the NGA. Thus, without citing any statutory language or legislative history from the NGA that would prohibit FERC's allocating current costs to current customers based on past purchasing practices and adopting the purchase deficiency method, and without any inquiry whatsoever into the justness and reasonableness of the resulting rates, the court of appeals invalidated FERC's decision.

To achieve this result, the court of appeals fashioned an unduly expansive interpretation of the filed rate doctrine which is not required by the statute and is wholly unsupported by this Court's interpretation of that doctrine as set forth in *Arkla*. Under the court of appeals' interpretation, "predictability," not preservation of agency jurisdiction, is the "fundamental policy" underlying the filed rate doctrine.[13] App. 11a, 15a. Thus, ac-

[13] The D.C. Circuit first raised the concept of predictability as the basis of the filed rate doctrine in *Electrical Dist. No. 1 v. FERC*, 774 F.2d 490 (D.C. Cir. 1985). In that case, the D.C. Circuit held

cording to the court below, once a customer has purchased gas from a pipeline at a given filed rate, FERC cannot allocate costs subsequently incurred by the pipeline based on the customer's past purchasing decisions, even if those decisions were the direct cause of the subsequent costs. App. 13a. Accordingly, the decision below converts a largely procedural rule [14] intended to protect FERC's ratemaking authority into a substantive tool used to achieve just the opposite result—to restrict severely FERC's ability and discretion in establishing just and reasonable rates.

This restrictive effect is easily illustrated here. Applicable regulations prohibit pipelines from recovering costs before they are "known and are measurable with reasonable accuracy." 18 C.F.R. § 154.63(e)(2); *El Paso Natural Gas Co.* v. *FPC*, 449 F.2d 1245, 1248-49 (5th Cir. 1971); *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570, 574 (D.C. 1990). It is undisputed that the buy-out and buy-down costs at issue here were not known and measurable, and thus not eligible for recovery, until the pipelines negotiated their take-or-pay settlements with producers. Those settlements could not occur until after the customers' purchase decisions which caused take-or-pay liability to accrue in the first place.

In two recent and significant ratemaking cases, the court of appeals has applied the interpretation of the filed rate doctrine articulated in the decision below to invalidate two FERC-approved allocation methods for different types of costs.[15] In *Columbia Gas Transmission Corp.*,

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that a rate is not "filed" for purposes of the filed rate doctrine until applicable statutory procedural requirements have been met. *Id.* at 492-93. "Predictability" as applied by the court there—to ensure customer awareness of FERC-approved rates—is thus vastly different than as applied by the court below.

[14] See *Arkla*, 453 U.S. at 595 (Stevens, J., dissenting).

[15] In another recent case, *Public Utilities Comm'n* v. *FERC*, 894 F.2d 1372 (D.C. Cir. 1990), the court of appeals applied its "pre-

supra, 831 F.2d 1135, the court of appeals struck down FERC orders permitting pipelines to allocate compression and gathering costs among customers based on the past purchases of those customers that resulted in the costs being incurred. According to the court, the allocation and recovery mechanism constituted a retroactive alteration of previously filed rates in contravention of the purpose of the filed rate doctrine. *Id.* at 1140. Most recently, in *Transwestern Pipeline Co.*, *supra*, 897 F.2d 570, which involved the implementation of a FERC policy to prevent the recurrence of take-or-pay problems in the future, the court of appeals similarly applied its expansive interpretation of the filed rate doctrine to prohibit allocation of unrecovered purchased gas costs to customers based on past contract demand levels. 897 F.2d at 577-78.

These decisions and the decision below have spawned tremendous confusion in the natural gas industry as to the proper meaning of the filed rate doctrine.[16] If not resolved by this Court, this confusion will continue, thereby seriously disrupting the industry at a time when such disruptions cannot be afforded. As Chief Judge Wald observed in a separate statement on denial of rehearing *en banc* in *Transwestern Pipeline Company*:

> I think the Court's current interpretation of the filed rate doctrine is overly rigid, at a time when the FERC needs latitude to navigate the recent dramatic changes in the structure of the natural gas industry . . . . It remains for the Supreme Court to settle this important question of how impenetrable a barrier the filed rate doctrine is to FERC's efforts

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dictability" theory to strike down FERC's attempt to distribute equitably tax overrecoveries to a pipeline's customers.

[16] The D.C. Circuit has recognized that its decisions in this area have been less than clear. See *Transwestern Pipeline Co.*, 897 F.2d at 577 (acknowledging confusion in the court's decisions concerning what notice to customers is required by the filed rate doctrine); App. 30a (Williams, J., concurring in denial of rehearing and rehearing *en banc* below).

> at allocating the inevitable burdens stemming from fundamental readjustment of the pipeline industry.

No. 88-1046, slip op. (D.C. Cir. May 31, 1990), App. 193a. Clearly, the D.C. Circuit's interpretation of the filed rate doctrine makes that court the obvious forum to choose for parties seeking to overturn FERC ratemaking decisions. Thus, it is quite unlikely that this precise issue will arise in any other court of appeals and, accordingly, immediate review by this Court is appropriate.

2. The court of appeals' intrusive approach toward FERC's orders is particularly inappropriate, and inconsistent with the approach of both this Court and other courts of appeals, because it occurred in a ratemaking context, where a "presumption of validity . . . attaches to each exercise of the Commission's expertise, and those who would overturn the Commission's judgment undertake [a] 'heavy burden. . . .'" *Permian Basin Area Rate Cases*, 390 U.S. at 767 (*"Permian Basin"*), citing *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944). See also *Colorado Interstate Gas Co.*, 324 U.S. at 589 (Congress granted FERC broad power to allocate costs which a court should not interfere with unless the allocation chosen "plainly contravenes the statutory scheme of regulation"). In *Permian Basin*, this Court made clear that "consonant with the broad responsibilities given to the Commission by Congress; it must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of reconciling diverse and conflicting interests." 390 U.S. at 797. In this case, however, the court of appeals cast aside FERC's effort to harmonize two fundamental ratemaking doctrines—the filed rate doctrine and the cost causation doctrine—consistent with the NGA. Instead, the court created an unwarranted tension between the two doctrines.[17]

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[17] The decision below conflicts with a recent Eighth Circuit decision in this regard. *Maislin Indus., Inc.* v. *Primary Steel, Inc.*,

3. The appropriateness of the decision below for review by this Court is further enhanced by the Court's recent grant of certiorari in *Mobil*. At issue in *Mobil* is yet another facet of FERC's restructuring plan, Order No. 451, which revised the vintage pricing system for "old gas" under the NGPA. Both cases raise questions concerning the deference that should be accorded under *Chevron* to FERC's interpretation of its ratemaking authority to deal with the restructuring problem, albeit under different statutes. Because both cases involve significant parts of FERC's overall effort to restructure the natural gas industry, considering them together will give the Court a more complete perspective of the complex issues posed by FERC's overall regulatory efforts.

Moreover, the importance of the *Chevron* question in this case is, if anything, much greater than in *Mobil*. At issue in this case is FERC's continuing ratemaking au-

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879 F.2d 400 (8th Cir. 1989), *cert. granted*, 110 S.Ct. 834 (1990) (*"Maislin"*), currently under review by this Court, involved the proper application of the filed rate doctrine under the ICA, 49 U.S.C. § 10761(a), vis-a-vis the ratemaking doctrine prohibiting "unreasonable practices," 49 U.S.C. § 10701(a). The Eighth Circuit recognized that:

> When conflicts between the two provisions arise "it is not for . . . [Courts] to place enforcement of one doctrine above the other." Instead, the proper authority to harmonize these competing provisions is the ICC.

879 F.2d at 405 (internal citation omitted). Accordingly, the court deferred to the ICC's decision to construe the filed rate doctrine so as not to violate another ratemaking doctrine which the ICC also was required to accommodate and administer under the ICA. *Id.*

Maislin involved a clear and conceded violation of the filed rate doctrine which was balanced with the ratemaking doctrine prohibiting unreasonable practices. Thus, it is distinguishable from this case, where FERC correctly found that there is no violation of the filed rate doctrine and that both the filed rate doctrine and the cost causation doctrine are satisfied by the purchase deficiency allocation method. Accordingly, even if this Court were to reverse *Maislin*, that would not likely provide any support for the expansive holding of the court of appeals in this case.

thority under the NGA, which was enacted over 50 years ago to provide FERC with broad authority to establish just and reasonable rates in the public interest. The new limitations on that authority imposed by the court below not only severely undermine FERC's restructuring effort in this and similar cases, but also has been extended to upset FERC's ratemaking decisions in other cases in different contexts. See *supra* p. 16. *Mobil*, on the other hand, involves FERC's much more limited ratemaking authority under the NGPA, which ceases on January 1, 1993 under the Decontrol Act.

In addition, the decision below is inconsistent with the intent of Congress in enacting the Decontrol Act. The legislative history of the Decontrol Act indicates that FERC's procompetitive initiatives, particularly its encouragement of open access transportation in Orders No. 436 and 500, were a major factor in Congress's decision to repeal remaining price and non-price controls on wellhead sales of natural gas "as not in keeping with the evolution of natural gas markets and the regulatory environment." S. Rep. No. 101-39, 101st Cong., 1st Sess. 2, 5-6 (1989). Thus, the decision of the court of appeals repudiates a major premise underlying Congress's enactment of the Decontrol Act.

4. Finally, the practical implications of the decision of the court of appeals are staggering. If it is not reversed, FERC's policy for resolving the take-or-pay crisis will be critically undermined. FERC will be forced to adopt another allocation method; and finding one that is otherwise just and reasonable to all the disparate parties will not be an easy or quick undertaking. Moreover, whatever solution is chosen will be subject to a new round of judicial challenges, consequent delay and uncertainty that for years has plagued efforts to resolve the take-or-pay crisis. More immediately, hundreds of administrative orders authorizing the passthrough of billions of dollars of take-or-pay costs will have to be vacated and the costs will have to be reallocated among pipeline customers and gas consumers.

In addition, as demonstrated by the recent *Columbia Gas Transmission Corp.* and *Transwestern Pipeline Co.* cases, the decision below transcends the take-or-pay crisis and purchase deficiency allocation method to jeopardize the validity of longstanding FERC cost allocation procedures that are based on the cost causation doctrine. For example, FERC analogized the purchase deficiency allocation method to its traditional practice of using customer purchases in past "base periods" to allocate gas supplies among customers under curtailment plans during later periods of gas shortage. The court of appeals, however, rejected that analogy on the unpersuasive basis that a curtailment plan is not a rate change. App. 15a. The court simply ignored the fact that filings to allocate gas supplies are analogous to filings to allocate costs because both are governed by the same provisions of Section 4 of the NGA. See, *e.g.*, *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 642-47 (1972); *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 966 (1986) ("the filed rate doctrine is not limited to 'rates' *per se*"). The court of appeals similarly ignored Tennessee's argument that FERC, with judicial approval, traditionally has used past customer purchases during a previous three day peak period to allocate current demand costs. Compare, *e.g.*, *State Corp. Comm'n* v. *FPC*, 206 F.2d 690 (8th Cir. 1953), *cert. denied*, 346 U.S. 922 (1954); *Mississippi River Fuel Corp.* v. *FPC*, 163 F.2d 433 (D.C. Cir. 1947). The decision below jeopardizes these allocation procedures and thereby restricts severely FERC's broad authority to allocate costs among pipeline customers.

Finally, the success of FERC's restructuring program is contingent on the solution of the take-or-pay problem. In at least three recent cases, courts of appeals have struck down major regulatory initiatives of FERC which were designed to implement the basic restructuring of the natural gas industry begun in Order No. 380, in part, because FERC had not yet resolved the take-or-pay problem. See *Mobil Oil Exploration and Pro-*

ducing Southeast, Inc. v. *FERC*, *supra* (Order No. 451 eliminating price vintages for old gas); *AGD I*, *supra* (Order No. 436 providing for open access of pipelines); and *Consolidated Edison Co.* v. *FERC*, 823 F.2d 630, 638-41, 644 (D.C. Cir. 1987) (liberal abandonment policy). The court of appeals in this case, by setting aside FERC's carefully crafted attempt to solve this fundamental take-or-pay issue, has not only exacerbated the basic liability problem itself but has undermined FERC's ability to deal with all other regulatory problems that are affected by these enormous unallocated costs. Thus, if the decision below stands, FERC will be severely hampered in its efforts to adopt new regulatory initiatives until a cost allocation methodology can be adopted by the Commission and approved by the D.C. Circuit, which will take years. Because the court of appeals' interference with FERC's solution to the take-or-pay problem was unjustified, this Court should grant the petition now.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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